(33850)

Supreme Court of the United States

No. 203—OCTOBER TERM, 1952

In the Matter
of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor,

THE CITY OF NEW YORK,
Petitioner,
against
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S BRIEF IN OPPOSITION TO MOTION TO MODIFY JUDGMENT AND TO STAY MANDATE

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(1)

The respondent's present motion rests on what we believe to be a gross misconstruction of the opinion of this Court. The respondent professes to believe that this Court has held that the City's "failure to file any claim would have barred its claim had it received actual notice, by mail *or otherwise*, of the bar order." (Respondent's motion, pp. 1-2, emphasis supplied.) The respondent then suggests to the Court in its motion papers that the City may have had actual notice of the bar order other than by receiving

a mailed copy from the respondent. It further suggests that this Court would have affirmed the judgment below if the record had contained proof that the City had actual knowledge of the bar order.

The opinion of this Court did not suggest that if the City had, in some fortuitous manner, other than through the process of the District Court, acquired actual knowledge that Order No. 32 was in existence, the City would have been under an obligation to file a claim for its liens. On the contrary this Court said:

> "But even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred. When the judge ordered notice by mail to be given the appearing creditors, New York City acted reasonably in waiting to receive the same treatment."

The relief which the respondent sought was denied by this Court because of respondent's failure to give the City the "statutory 'reasonable notice'" to which the City was entitled. Respondent has never claimed that Order No. 32 was served upon the City of New York (other than by publication). Even now in its motion papers it does not suggest that such service actually occurred. It merely suggests that the City acquired knowledge of the existence of the bar order in some undisclosed manner in no way connected with the statutory requirements for the giving of notice. Since this Court has held that unless the City of New York received notice of the bar order pursuant to the provisions of the statute and through the process of the Court, whether or not the City knew that the bar order existed is entirely immaterial. It is as though a defendant in any action could be held bound to appear and defend therein even though service of a summons had not been made upon him simply because he knew that the plaintiff had prepared a summons and served it on a co-defendant.

Finally, we should like to point out, as we have all along, that neither Order No. 32 nor the published notice mentioned the City of New York by name. Even if some responsible official of the City of New York had by chance seen the published notice, or had read Order No. 32 in the files of the District Court, or had been told of the existence of Order No. 32 by the Trustees of the debtor, nothing contained in the order or in the notice of publication would have led the City to believe that it was intended to be affected thereby.

(2)

From what has been said we do not intend that it be implied that the City had actual knowledge of Order No. 32 during the pendency of the reorganization proceedings. Such an admission will nowhere be found in the record. The necessity for the City of New York to deny affirmatively that it had actual knowledge of Order No. 32 never arose. This was the result of the calculated position taken by the respondent throughout this entire proceeding.

At no time up to the present motion has respondent stated or even inferred that the petitioner had actual knowledge of Order No. 32. Its position rather has been that the City, having actual knowledge of the reorganization proceedings, was barred from asserting its assessment liens by reason of the service of the bar order upon the City of New York by publication. This position the respondent has consistently maintained at every stage of this proceeding—in its petition to the District Court (R. 3), the affidavit of its tax agent, Webster (R. 20), its brief in the Court of Appeals (pp. 15, 19), its brief to this Court in opposition to the petition for a writ of certiorari (pp. 13, 14), and its brief to this Court in this cause (pp. 7, 24, 25, 26-29). The respondent now seeks to abandon this heretofore consistently maintained position and advances a new theory for securing relief. It now attempts to maintain that the City's assessment

liens should be barred because the City of New York may have had actual knowledge of Order No. 32, knowledge which even now the respondent is unable to say that the City received under the provisions of the statute and pursuant to the process of the Court.

We believe we have demonstrated that the respondent's position is legally untenable. In addition, the respondent's present motion is simply an attempt to reopen this litigation upon a theory always available to it and deliberately ignored heretofore.

Furthermore, we think it a safe assumption that the respondent and its attorneys were always aware of the fact that notice by publication is a poor and sometimes a hopeless substitute for actual notice,* and if they could have relied upon actual notice, they would have done so at the outset. Our belief on that score is fortified by the fact that even on the present motion the respondent is careful to refrain from saying more than that it "has reason to believe that the City had actual notice of the bar order other than by receiving from respondent a mailed copy." That unsupported statement advanced at this late date is surely no ground for a modification. For, as we have already pointed out, this Court has made it clear that the determining fact is not whether notice has been acquired but whether there has been actual *service* of notice. Admittedly, the City of New York was never served with the bar order.

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* We paraphrase the sentence of this Court's opinion herein, which reads: "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice."

CONCLUSION

The respondent's motion to modify the judgment of this Court and to stay its mandate should be denied.

February 9, 1953.

Respectfully submitted,

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